ASIATIC DEVELOPMENT BERHAD & ANOR.

v.

BALACHANDAR A/L PALANYSAMY

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' MAHADEV SHANKAR JCA
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J
[CIVIL APPEAL NO. M-02-16-95]
16 AUGUST 1995

PRACTICE & PROCEDURE: *New evidence - Application to adduce fresh evidence - Whether wholly misconceived - Prerequisite conditions - Consideration of the principles of Ladd v. Marshall - Whether conditions met.*

The respondent had filed a civil claim for negligence against the appellants in respect of a road accident involving a motorcycle he was riding and a motorvan driven by the second appellant. In the suit the police Sergeant who drew the sketch plan of the accident gave evidence to the effect that, there were scratch marks near the place where the motorcycle had come to rest but that these marks had been there before the accident. Subsequently, the second appellant was prosecuted for driving without due care and attention in connection with the same traffic accident. At the trial of the second appellant before the learned Magistrate, the Sergeant again gave evidence. The facts showed that during his cross-examination, questions were put by Counsel to him that "Rajah kasar & kunci, P2 & P3, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?" to which the Sergeant answered "ya, setuju", and "apakah 'J'?" which received the answer "kesan calar pada jalanraya." In this appeal the appellants contended that what transpired in the cross-examination constituted fresh evidence, as the Sergeant in effect said that the scratch marks were made by the traffic accident. The appellants argued that the evidence was not available at the civil trial, and hence, on the strength of the principles laid down in *Ladd v. Marshall* [1954] 3 All ER 745, sought to adduce the same in the appeal.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] In the context of this case, the question put by Counsel cannot be understood to mean that the scratch marks were caused by the accident. Taken in its proper context all that it could mean is that the Sergeant was agreeing that what he put in the sketch plan was what he saw at the scene. Nowhere in the criminal proceedings has he stated that the scratch marks were made by this accident.

[2] The Sergeant's evidence as to when the scratch marks were made was purely his opinion. Technically it was inadmissible because no evidence had been led to show that the Sergeant's evidence on this point was empirically correct.

[3] Having regard to the rules in *Ladd v. Marshall* it is self-evident that the new evidence sought to be adduced completely failed the second and third conditions because, first of all, it should have had no influence whatsoever on the trial Judge, and secondly, even if the opinion of the Sergeant was admissible which, in the circumstances of this case was not, the Sergeant's belief was purely subjective and the Court would have had to make up its own mind.

[Application dismissed].

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Keterangan baru - Permohonan untuk mengemukakan keterangan baru - Samada disalah-tafsirkan seluruhnya - Syarat mutlak - Pertimbangan terhadap prinsip-prinsip Ladd lwn. Marshall - Samada syarat-syarat dipatuhi.*

Responden telah menfailkan tuntutan sivil bagi kecuaian terhadap perayu berhubung dengan kemalangan jalanraya yang melibatkan sebuah motorsikal yang telah beliau tunggang dengan sebuah motovan yang dipandu oleh perayu kedua. Dalam guaman tersebut, Sarjan polis yang melukis rajah kasar kemalangan tersebut telah memberi keterangan mengenainya bahawa, terdapat tanda-tanda calar ini berdekatan tempat dimana motorsikal tersebut telah terhenti tetapi bahawa tanda-tanda calar ini telah berada di tempat itu sebelum kemalangan tersebut. Berikutan itu, perayu kedua telah didakwa kerana memandu tanpa berhemat dan berhati-hati sehubungan dengan kemalangan trafik yang sama. Pada perbicaraan perayu kedua di hadapan Tuan Majistret yang bijaksana, Sarjan tersebut telah sekali lagi memberi keterangan. Fakta-fakta tersebut menunjukkan bahawa ketika pemeriksaan-balasnya, soalan-soalan telah dikemukakan oleh Peguam kepadanya bahawa, "Rajah kasar dan kunci, P2 & P3, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?" yang mana dijawab oleh Sarjan tersebut, "ya, setuju," dan bagi soalan "apakah 'Y'?" jawapan yang diterima adalah, "kesan calar pada jalanraya." Dalam rayuan ini perayu menegaskan bahawa apa yang berlaku dalam pemeriksaan-balas tersebut membentuk keterangan baru, kerana Sarjan yang dipersoalkan telah menyatakan bahawa tanda-tanda calar tersebut telah dibuat oleh kemalangan trafik tersebut. Perayu-perayu tersebut telah berhujah bahawa keterangan itu tiada pada perbicaraan sivil, dan dengan itu, berdasarkan prinsip yang dibentangkan dalam *Ladd lwn. Marshall* [1954] 3 All ER 745, berusaha untuk mengemukakannya dalam rayuan.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Dalam konteks kes ini, persoalan yang dikemukakan oleh Peguam, tidak boleh dimaksudkan bahawa tanda-tanda calar tersebut telah disebabkan oleh kemalangan itu. Menurut konteksnya yang betul, ianya boleh bermaksud bahawa Sarjan tersebut bersetuju bahawa apa yang dilukiskan dalam rajah kasar tersebut adalah apa yang dilihatnya di tempat kejadian. Tidak terdapat pun mana-mana dalam prosiding jenayah tersebut beliau menyatakan bahawa tanda-tanda calar itu telah dibuat oleh kemalangan tersebut.

[2] Keterangan Sarjan itu mengenai bilakah tanda-tanda calar itu telah dibuat adalah semata-mata pendapatnya sahaja. Secara teknikal, ianya tidak boleh diterima kerana tidak terdapat keterangan yang menunjukkan bahawa keterangan Sarjan itu mengenainya adalah betul menurut penelitian.

[3] Dalam menimbangkan kaedah-kaedah dalam *Ladd lwn. Marshall* ianya jelas menerangkan dengan sendirinya bahawa keterangan baru tersebut yang dikemukakan secara kesuluruhannya tidak mematuhi syarat-syarat kedua dan ketiga kerana, pertamanya, ianya tidak seharusnya mempengaruhi Hakim perbicaraan, dan keduanya, sungguhpun pendapat Sarjan tersebut boleh diterima yang mana, menurut keadaan kes ini tidak diterima, kepercayaan Sarjan tersebut adalah sesungguhnya subjektif dan Mahkamah tentunya terpaksa membuat keputusannya sendiri.

[Permohonan ditolak].

Cases referred to:
Ladd v. Marshall [1954] 3 All ER 745 ***(dist)***
Lan Soo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(dist)***

For the appellant - Toh Chin Chong, M/s. Murphy & Dunbar.
For the respondent - Raghbir Singh Gill, M/s. Raghbir Singh Gill & Co.

JUDGMENT

Mahadev Shankar JCA:

This is an application to adduce fresh evidence of appeal.

On 8 March 1991 there was a traffic accident at Batu 23, Jalan Tebong, Melaka between a van and a motorcycle. The van was owned by the first appellant and driven by the second appellant. The respondent was the rider of motorcycle. The respondent subsequently filed a civil suit in the Malacca High Court.

One of the withnesses called was the Sergeant who investigated the accident. He went to the scene after the police report, drew a sketch plan, made a key and had photographs taken.

In his evidence in the civil suit on 4 August 1994 he said that he had found some scratch marks near the centre of the road close to the place where the motorcycle had come to rest. But he stated in his examination-in-chief that these marks had been there before the accident and they were therefore not involved in this accident. In cross-examination he reiterated this evidence.

The High Court delivered judgment on 24 December 1994. Against that judgment there is now an appeal pending in this Court.

On 25 January 1995 the van driver (the second appellant) was prosecuted in the Magistrate's Court in Alor Gajah for driving without due care and attention in connection with the same traffic accident. The Sergant again gave evidence. In his examination-in-chief he produced the sketch plan. In cross-examination his answer to most of the questions asked was that he could not remember or he was not sure. Then came these questions and answers:

> S: Rajah kasar & kunchi, P2 & P2K, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?
>
> J: Ya, setuju.
>
> S: Apakah "J"?
>
> J: Kesan calar pada jalanraya.

The contention of the appellant's Counsel before us is that this means that he was now saying the scratch marks were made by this traffic accident and was in contradiction to the Sergeant's earlier evidence that these scratch marks had nothing to do with the accident at all and had been there before.

We think that Counsel's interpretation is quite untenable. The question "Rajah kasar & kunchi, P2 & P2K, dibuat berdasarkan apa yang kamu lihat yang ada kaitan dengan kemalangan kes?" must not be understood in the context of this case to mean that the scratch marks were caused by the accident. Taken in its proper context all that it could mean is that the Sergeant was agreeing that what he put in the sketch plan was what he saw at the scene. Nowhere in the criminal proceedings has he stated that the scratch marks were made by this accident.

The Sergeant's evidence as to when the scratch marks were made was purely his opinion. Technically it was inadmissible because no evidence had been led to show that the Sergeant's evidence on this point was empirically correct.

This application involves a very important principle of law to which neither the Counsel appears to have fully directed his mind.

Appellants' Counsel cited *Ladd v. Marshall* [1954] 3 All ER page 745. He suggested that merely because this evidence was not available at the civil trial, it should now be put in. *Ladd v. Marshall* was applied by the Federal Court in *Lan Soo Sun v. Government of Malaysia* [1970] 2 MLJ page 70. Suffian FJ (as he was then) said:

> To justify the reception of this evidence "three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.
>
> These were tests enunciated by Denning LJ (as he then was) at page 748 in *Ladd v. Marshall.*

It is self-evident that the new evidence sought to be adduced completely failed the second and third conditions because first of all it should have had no influence whatsoever on the trial Judge and secondly even if the opinion of the Sergeant was admissible which, in the circumstances of this case it was not, the Sergeant's belief was purely subjective and the Court would have had to make up its own mind.

Consequently we held that this application was wholly misconceived and therefore dismissed it with costs.

We wish to add that after conclusion of the arguments on 14 August we adjourned the matter for judgment. As we were about to deliver our decision on the morning of the 16th, the respondent's Counsel handed up a list of 11 authorities. This was done all too late and to no purpose. We therefore direct that the costs to be paid by the applicant should not include any cost whatsoever to the respondent for looking up the law.